UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THRIVEST SPECIALTY FUNDING, LLC, Petitioner, v. TOBY L. WRIGHT, Respondent.	Civil Action No. 2:18-cv-

PETITION TO COMPEL ARBITRATION

Petitioner Thrivest Specialty Funding, LLC ("Thrivest") petitions this Court under 9 U.S.C. § 4 for an order directing respondent Toby L. Wright ("Wright") to arbitrate the parties' dispute regarding the Non-Recourse Finance Transaction, Sale and Purchase Agreement #2 (the "Agreement") through which Thrivest purchased a portion of Wright's expected $1.9 million recovery in the NFL Concussion Class Action (the "TSF Distribution") for $323,792.15.

INTRODUCTION

1. In October 2016, Wright had already received--from a funder other than Thrivest--two advances against his expected recovery in the NFL Concussion Class Action. The latter advance obligated him to the equivalent of more than 150% annualized interest. Seeking relief from that rate, Wright approached Thrivest, which offered the lowest rate of any non-recourse funder at 19% per annum.

2. Thrivest purchased Wright's agreement with the other funder, forgave almost $95,000 of Wright's current obligation, and refinanced Wright into a new 19% agreement that provided Wright with an additional $27,602.54 in cash to help with his financial needs.

3. Two years later, Wright informed Thrivest that he had been approved for a monetary award in the NFL Concussion Class Action. However, instead of honoring his promise to transfer the TSF Distribution to Thrivest, Wright demanded that Thrivest waive its rights under the Agreement in exchange for a return of principal only.

4. Thrivest refused Wright's ultimatum and asked him to honor the Agreement. Wright declined, placing him in breach. Thrivest then pointed to the Agreement's arbitration clause and demanded that Wright arbitrate the dispute. Wright refused to arbitrate, prompting this action.

5. Wright asserts that the entire Agreement is invalid under Section 30.1 of the Settlement Agreement in the NFL Concussion Class Action (the "No Assignment of Claims Provision"), but Wright does not dispute the making of the Agreement or specifically challenge its arbitration clause. Precedent from the Supreme Court of the United States and the plain language of the parties' agreement to arbitrate direct that this Court should enter an order compelling arbitration. See Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 72 (2010) ("even … where the alleged fraud that induced the whole contract equally induced the agreement to arbitrate which was part of the contract—we nonetheless require the basis of challenge be directed specifically to the agreement to arbitrate before the Court will intervene").

PARTIES

6. Petitioner Thrivest is a Delaware limited liability company with its principal place of business at 40 E. Montgomery Avenue, Suite 416, Ardmore, Pennsylvania 19003; Thrivest's members are citizens of the Commonwealth of Pennsylvania.

7. Respondent Wright is an adult individual, a member of the class of former NFL players in the NFL Concussion Litigation, and a citizen of the State of Arizona. His residence address is 6202 Winston East Drive Phoenix, Arizona 85042.

JURISDICTION AND VENUE

8. The Court has subject matter jurisdiction under 28 U.S.C. § 1332 because complete diversity of citizenship exists between Thrivest and Wright, and the amount in controversy exceeds $75,000.

9. The Federal Arbitration Act provides:

> [a] party aggrieved by the alleged failure, neglect, ***or refusal of another to arbitrate under a written agreement for arbitration*** may petition any United States district court which, . . ., in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

See 9 U.S.C. § 4 (emphasis added).

10. Venue is proper here because Thrivest and Wright agreed to arbitrate disputes within the Commonwealth of Pennsylvania and Thrivest is located within this judicial district. See Agreement, a true and correct copy of which is attached as "Exhibit A."

FACTUAL BACKGROUND

A. Wright Approaches Thrivest For Relief From A High-Rate Advance And Thrivest Facilitates A Low-Rate Substitute By Forgiving Almost $95,000 Of Wright's Current Obligation.

11. Wright played 6 seasons in the NFL and 1 season in the XFL; allegedly as a result of his football playing career, Wright suffers from post-concussion syndrome.

12. Consequently, Wright was eligible to participate as a Class Member in In re: National Football League Players' Concussion Injury Litig., Case No. 2:12-md-02323-AB/MDL No. 2323 (E.D. Pa.) (the "NFL Concussion Class Action").

13. Based upon his years of service and diagnosis, Wright expected to qualify for a $1.9 million award under the Settlement Agreement in the NFL Concussion Class Action; however, in view of anticipated delays, he knew that he would have to wait to receive it.

14. On May 23, 2016, Wright sold a portion of the proceeds from his expected award to Cash4Cases, Inc. ("Cash4Cases") in exchange for a $197,290.39 advance.

15. Under the terms of the Cash4Cases agreement, Wright was obligated to transfer $374,851.74 of his award to Cash4Cases regardless of when he received it; in October 2016, that transaction bore the equivalent of more than 150% annualized interest.

16. Seeking relief from the terms of the Cash4Cases agreement, Wright approached Thrivest, which offered the lowest rate on non-recourse advances in the industry (19% per annum).

17. Initially, Thrivest told Wright that it could not facilitate a refinance transaction because Wright's obligations to Cash4Cases placed him outside of the firm's underwriting criteria; however, when Wright pressed for assistance, Thrivest agreed to purchase the Cash4Cases agreement, forgive almost $95,000 of Wright's existing obligation, and refinance Wright into a new 19% agreement.

18. To confirm Wright's diagnosis and capacity to make independent legal and financial decisions, Thrivest sought the opinion of Wright's primary physician (Kam D. Hunter, M.D.) and reviewed detailed reports from Wright's examining neurologists (Jeffrey I. Victoroff, M.D. of the University of Southern California and Lorne S. Label of California Neurological Specialists); Thrivest also considered a neuropsychological examination conducted by Steven A. Castellon, Ph.D. of the University of California, Los Angeles.

19. Dr. Hunter confirmed that Wright had been under his care for several years and was being treated for post-concussion syndrome; Dr. Hunter opined that Wright was of "sufficiently sound mind and possesses sufficient mental capacity to understand and sign legal documents"—a conclusion that was supported by the other medical experts.

20. Thrivest clearly articulated the terms of the transaction on the first two pages of its Agreement, which Wright initialed:

DISCLOSURE STATEMENT

Distribution:	
The financial portion of the Settlement that the Seller is personally entitled to:	$1,900,000.00
TSF Distribution:	
The portion of the Distribution that is being sold by the Seller and purchased by Buyer:	$ 570,000.00
The TSF Purchase Price amount:	
The dollar amount being paid to the Seller by Buyer as consideration for the sale of the TSF Distribution (as set forth in Exhibit B hereof):	$ 323,792.15
Payoff of prior liens and judgments:	$ 280,000.00
Net payment to Seller:	$ 27,602.54

Transaction Fees (which shall not be deemed to be interest (if this agreement is characterized as a loan) to be paid by Seller:

Origination Fee	$ 1,573.96
Application Fee	$ 200.00
Underwriting Fee	$ 3,147.92

Initial here

Due Diligence Fee	$ 4,721.88
Lien/Judgment Search Fee	$ 3,147.92
Broker Fee	WAIVED
Legal Fee	$ 3,147.92
Closing Fee	$ 250.00
Total Transaction Fees:	$ 16,189.61

21. Thrivest not only substantially reduced Wright's existing obligation, but it also provided Wright with an additional net payment of $27,602.54 to help with his financial needs.

22. Wright signed the Agreement on October 5, 2016.

23. In connection with the Agreement, Wright also executed a "Limited Irrevocable Power of Attorney," which transferred to Thrivest authority to deposit checks payable to Wright from the NFL Concussion Class Action settlement—"I understand that by executing this Power of Attorney, I am giving up the right to endorse and deposit the Payments, except as otherwise

authorized by Buyer. This Power of Attorney may not be revoked or changed except upon the prior written consent of TSF."

24. Wright also executed a "Certification," wherein he certified (under penalty of perjury) the accuracy of all of his statements in the Agreement—including his representation to Thrivest in Section 3(c) that he "has the unrestricted right to assign the TSF Distribution."

B. More Than Two Years Later, Wright Claims That The Agreement Is "Invalid," Reneges On His Promises, And Refuses To Arbitrate.

25. By all indications, Wright was satisfied with the transaction; he never complained, and his attorney (Jason Luckasevic, Esquire) provided regular updates on the status of his claim to Thrivest.

26. But, in October 2018 after the Claims Administrator approved Wright's award, Wright told Thrivest that he would not honor his promise to transfer the TSF Distribution to Thrivest; instead, Wright gave Thrivest an ultimatum—either waive its rights under the Agreement by October 27, 2018 and recover only principal, or receive no repayment whatsoever.

27. Wright purported to justify this abrupt change by referencing the December 8, 2017 Explanation and Order by the District Court in the NFL Concussion Class Action, wherein, without specific reference to any particular class member or transaction, the Court opined that "Class Members are prohibited from assigning or attempting to assign any monetary claims, and any such purported assignment is void, invalid and of no force and effect."

28. Thrivest was not a party to the NFL Concussion Class Action or the Settlement Agreement resolving that dispute, and neither Thrivest nor Wright are referenced in the Court's Explanation and Order, which is currently the subject of numerous pending appeals before the United States Court of Appeals for the Third Circuit. See generally In re: National Football League

Players' Concussion Injury Litig., Nos. 18-1040; 18-1482; 18-1639; 18-2184; 18-2582; 18-3005 (3d Cir. Jan. 4, 2018).

29. Thrivest asked Wright to arbitrate their dispute over whether the Agreement is valid and, if so, whether Wright breached, but White refused.

C. The Arbitrator, Not The District Court, Must Decide Whether The Agreement Is Valid And Whether Wright Breached His Promises.

30. The Agreement between Thrivest and Wright contains a clause designating AAA arbitration as the exclusive method of dispute resolution (the "Arbitration Agreement") as follows:

> Dispute Resolution. Notwithstanding anything to the contrary herein, Buyer and Seller unconditionally agree that any dispute, controversy or claim arising out of, or relating in any way to this purchase and sale Agreement, including without limitation, any dispute concerning the construction, ***validity***, interpretation, ***enforceability***, ***alleged breach by either party***, and/or any other term set forth in the Agreement ***shall be exclusively resolved by binding arbitration*** upon Buyer or Seller submitting the dispute to the American Arbitration Association within 30 days of written notice to the other party.

See Agreement at Section 6(z) (emphasis added) (Exhibit A).

31. Thrivest and Wright selected Pennsylvania law as governing the arbitration and agreed that the arbitration "shall be conducted within the jurisdiction of the Commonwealth of Pennsylvania." Id.

32. The Arbitration Agreement provides that either party "may apply (in the event of an emergent issue) to a Pennsylvania state or federal court for interim or emergent relief, including without limitation a proceeding to compel arbitration." Id.

33. The Arbitration Agreement obligates the "unsuccessful party" to bear the cost of the arbitration proceeding and Section 5(d) of the Agreement requires Wright to pay "all costs and expenses incurred by [Thrivest] (including reasonable attorney's fees) paid to enforce the terms of the Agreement" in the event of a breach by Wright. See id. at Section 5(d) and 6(z).

34. Moreover, the Agreement contains a conspicuous class action waiver (the "Class Action Waiver"):

> SELLER HEREBY WAIVES THE RIGHT TO CONSOLIDATE UNDER ANY MULTI DISTRICT LITIGATION OR OTHER CONSOLIDATION, OR BECOME PART OF A CLASS ACTION, OR ANY OTHER PROCEEDING, CONTROVERSY, ARBITRATION AND/OR DISPUTE OF ANY NATURE INVOLVING ANY PERSON OR ENTITY WHO IS NOT A PARTY TO THIS AGREEMENT.

See Agreement at Section 6(bb) (emphasis added) (Exhibit A).

35. Merits of the District Court's interpretation of the No Assignment of Claims Provision aside, the case law is clear that only an arbitrator has jurisdiction over Thrivest's Agreement with Wright under both the Arbitration Agreement and the Class Action Waiver. See Rent-A-Center, 561 U.S. at 72 (noting "a party's challenge to [a provision other than the arbitration clause], or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate"); and AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (upholding class action waiver and invalidating a law conditioning enforcement of arbitration on the availability of class procedure because that law "interfere[d] with the fundamental attributes of arbitration").

36. There can be no dispute that Wright's challenge to the validity of the Agreement and Thrivest's claim for breach fall squarely within the Arbitration Agreement and thus this Court must compel Wright to arbitrate that dispute.

COUNT I
CLAIM TO COMPEL ARBITRATION

37. Thrivest incorporates by reference its previous allegations.

38. The Federal Arbitration Act ("FAA") "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural

policies to the contrary." Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983).

39. The Supreme Court of the United States mandates that both state and federal courts must enforce the FAA with respect to all arbitration agreements covered by that statute, and must enforce the bargain of the parties to arbitrate. Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012) (internal citation omitted).

40. Section 2 of the FAA requires judicial enforcement of Arbitration Agreements "save upon such grounds as exist at law or in equity for the revocation of any contract" as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, ***shall be valid, irrevocable, and enforceable***, save upon such grounds as exist at law or in equity for the revocation of any contract.

See 9 U.S.C. § 2 (emphasis added).

41. There is no doubt that Thrivest and Wright agreed to arbitrate this dispute and that Wright waived any right to resolve disputes under the Agreement in the NFL Concussion Class Action; yet, Wright refuses to submit to AAA's jurisdiction and contends that the Court's December 8, 2017 Explanation and Order voided his obligations to Thrivest under the Agreement, leaving him with a substantial windfall.

42. The Arbitration Agreement is enforceable by this Court under the FAA, which specifically authorizes this Court, upon petition, to enter an order directing that arbitration proceed in the manner provided for in the parties' Arbitration Agreement. See 9 U.S.C. § 4.

WHEREFORE, Thrivest respectfully requests that the Court enter an order in the form proposed directing Wright to arbitrate the parties' dispute in arbitration before the American

Arbitration Association, awarding Thrivest its costs and fees incurred in bringing this action, and awarding any further relief that the Court deems appropriate.

Respectfully submitted,

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